16 Emerging trends in the dispute settlement mechanism in the Free Trade Agreements of China, South Korea and Japan

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Asian countries jumped on the bandwagon signing Free Trade Agreements (FTAs) at a considerably fast speed, after the collapse of the Ministerial Meeting of the World Trade Organization (WTO) at Cancun in 2003. The Asian economic drivers like China and India were new in this journey. ASEAN countries, on the other hand, were focusing on establishing their ASEAN free trade zone, which was in the early stages of development. At the same time, ASEAN started negotiating with China, Japan and South Korea to form an ASEAN+3 Agreement. India also joined the same club by forming an extended ASEAN+4. Among Asian countries, Singapore, Japan and South Korea started negotiating and signing FTAs with other economically developed countries, like the US and the EU. These countries were considered as like-minded countries, so FTAs with them were a natural course of action. Otherwise, the rest of the Asian countries were moving slowly in signing FTAs. Once China started flexing its economic prowess, the FTAs negotiation and conclusion started taking new turns. This was further fuelled by the commencement of negotiations on East Asian Communities (EAC) envisaging the EU-type communities for the Asian Countries.

The EAC negotiations were conducted on the sidelines of the ASEAN meetings. However, soon, the EAC negotiations faced a stumbling block on the issue of leadership, the definition of Asia, mainly in terms of coverage of Asian countries within the EAC, including whether Australia and New Zealand should be part of the EAC or not, and above all, on security concerns. This inclusion issue went beyond its anticipation when Russia requested to join the EAC as a member, or at least, as an observer. Now, the discussion on the EAC has become a mere event on the side of the ASEAN meetings. Once the EAC negotiation started to cool down, the Asian countries started negotiating separately with developed and developing countries, including those in Africa and Latin America. From Asia, the target countries were China, Japan, South Korea, India, Malaysia, Indonesia and Singapore. Australia and New Zealand also started FTA negotiations with these countries.

Over a period of time, Asian countries started negotiating their FTAs in more sophisticated ways, as compared to their earlier approach of negotiating on the basis of the text prepared by the other parties, mainly by the developed countries. New approaches of Asian countries have shown new innovations in their FTAs provisions. What was considered an unfeasible task has started becoming a reality. New experiments have been made. This chapter focuses on these new experiments and trends emerging from the State-to-State dispute settlement

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provisions of the FTAs of Asia. For this purpose, recently signed FTAs of China, South Korea and Japan with Australia will be considered. These three countries are powerful economies of Asia, and their approach in the dispute settlement in their FTAs can be considered as representative of the Asian trend. The FTAs under consideration in this chapter have also raised discussions on the Investor-State dispute settlement mechanism. For example, the Australia-China FTA has proposed to negotiate an appellate mechanism for Investor-State disputes, which is very innovative, and a hot topic in the international arena. However, as the focus of this chapter is on State-to-State dispute settlement, discussion on Investor-State disputes is beyond the scope of this chapter.

FTAs of China, South Korea and Japan with Australia

The Australia-China FTA was signed on 17 June 2015 and became effective on 20 December 2015. The Australia-China FTA is the newest FTA of China, which represents a new trend in the dispute settlement mechanism of China.

Chapter 15 of the Australia-China FTA contains the State-to-State dispute settlement mechanism. In addition to the main provisions, this chapter includes three new items: (1) Code of Conduct (Annex-15-A), (2) Model Rules of Procedure for the Arbitral Tribunal (Annex-15-B) and (3) Indicative Time Table for the Arbitral Tribunal attached with Annex B (Annex 15-B). Code of Conduct, Model Rules and Time Table have now become part of the FTA applicable to the State v State disputes. Among these three, the Code of Conduct for Arbitrators has been used for the first time.

The Korea-Australia FTA was signed on the 8 April 2014 and became effective on 12 December 2014. Like the Australia-China FTA, the Korea-Australia FTA also shows some new trends in dispute settlement. The Korea-Australia FTA also includes a Code of Conduct (Annex 20-A), Model Rules of Procedure (Annex 20-B) and an Indicative Time Table for a Dispute Settlement Panel as part of the Model Rules of Procedure for Dispute Settlement Panel Proceedings (Attachment to Annex 2-B). From the structural point of view, the dispute settlement mechanisms of both the Australia-China FTA and the Korea-Australia FTA look similar, as Australia is the common partner in both the FTAs. Both FTAs were signed in close proximity, so one may see the influence of one on the other.

The other major Asian economy, Japan, has also signed an agreement with Australia, which included the Code of Conduct in its dispute settlement mechanism.[2] In contrast with Korea and China, the Australia-Japan FTA requires not only arbitrators or panelists but also assistants and administrative personnel to comply with the Code of Conduct.[3] The Obligation of Self-Disclosure contained in the Code of Conduct is exclusively applicable on arbitrators.[4]

The Code of conduct imposes a duty on arbitrators to remain independent and impartial[5] and stresses the performance of duties by arbitrators[6] and maintenance of

2 The Australia-Japan FTA was signed on 8 July 2014 and became effective on 15 January 2015.
3 Australia-Japan FTA, Rules of Procedure of Arbitral Tribunals, Para 6.
4 Section IV of the Code of Conduct of the Australia-Japan FTA contains the provisions of Obligation of Self-Disclosure.
5 Australia-China FTA, Code of Conduct, Paras 12–17; Korea-Australia FTA, Code of Conduct Paras 11–16.
6 Korea-Australia FTA, Code of Conduct, Paras 4–10; Australia-China FTA, Code of Conduct, Paras 5–11.

confidentiality.[7] As these obligations are important in maintaining the integrity of the dispute settlement system, these obligations are included in both the Australia-China FTA and the Korea-Australia FTA through the Code of Conduct. The Australia-Japan FTA enforces the Code of Conduct on arbitrators, arbitrators' assistants and administrative personnel, thus, the coverage of the Code of Conduct is wider as compared to the Australia-China FTA and the Australia-Korea FTA.

Cooperation – a new means of dispute resolution

The Australia-China FTA follows the consistent pattern of China for the dispute settlement mechanism in the FTAs of Asia, which encourages "cooperation" as the first means of resolving disputes and obliges the parties to "make every attempt through cooperation to arrive at a mutually satisfactory resolution of any matter that might affect" the operation of the Australia-China FTA including the agreement on "the interpretation and application of this Agreement."[8] The importance of cooperation as the first port of call may be assessed by the fact that the recently concluded Trans-Pacific Partnership (TPP) also emphasises "cooperation."[9]

The Korea-Australia FTA has also emphasised "cooperation" and requires parties to "endeavour to agree" on the interpretation and implementation of the FTA. Similar to the Australia-China FTA, the parties to the Korea-Australia FTA also have to "make every attempt through cooperation" to arrive at a mutually satisfactory resolution of any matter that might affect the operation of the Korea-Australia FTA.[10]

The Australia-Japan FTA does not have any stand-alone provision on cooperation, like the Australia-China FTA or the Korea-Australia FTA. However, the Australia-Japan FTA has "Good Offices, Conciliation and Mediation," and the Australia-China FTA has "Good Offices, Conciliation and Mediation," together with a cooperation provision. The Korea-Australia FTA does not have "Good Offices, Conciliation and Mediation." Though the Australia-Korea FTA shows the trend of including cooperation as a means of resolving disputes, at the same time excluding the means of "Good Offices, Conciliation and Mediation," it is still too early to say whether this will be a future trend. It is also a fact that almost every FTA includes "Good Offices, Conciliation and Mediation"; however, the use of this method for dispute resolution is insignificant. Even at the level of WTO, the method of "Good Offices, Conciliation and Mediation" is seldom used.

Though we see the use of cooperation in the dispute settlement mechanism of FTAs now, it is too early to understand the implication of this provision. For example, is it an obligation that, if breached, may give rise to an action under the FTA? In other words, if parties do not cooperate during consultation or at a post-award phase, e.g., for fixing of a reasonable period of time, would that mean the cooperation provision has been violated by the recalcitrant party and therefore the claimant may initiate another action against the party at fault? What standard should be used to ascertain whether a party has breached the cooperation obligations or not whenever the tribunal does face such a question? Considering the general approach of Asian countries to resolve the dispute amicably, the inclusion of cooperation

7 Australia-China FTA, Code of Conduct, Paras 19–21; Korea-Australia FTA, Code of Conduct, Paras 18–20.
8 Australia-China FTA, Article 15.1.
9 TPP, Article 28.2
10 Korea-Australia FTA, Article 20.1.

as the first port of call for dispute resolution is laudable, but for the rule-based system of dispute resolution, this is far from complete and practical.

Independence and impartiality of arbitrators

Independence and impartiality in any decision-making process is a very important aspect. Therefore, the Code of Conduct in the Australia-China FTA, Korea-Australia-FTA and Australia-Japan FTA has paid special attention to it and provided a general obligation on the arbitrators to be "independent and impartial," to act in a "fair manner" and to avoid "creating an appearance of impropriety or bias".[11] It further adds that an arbitrator must not be influenced by self-interests, outside pressure, political considerations, public clamour, loyalty to a party or fear of criticism.[12] Arbitrators are also required to take action in such a manner that it should not give any indication that people at a special position influence them. In order to counter that impression, arbitrators are required to make every effort to displace such an impression. Moreover, arbitrators are not allowed to use their position on the arbitral tribunal to advance any personal or private interests.[13]

Past dealings of arbitrators are also under the scanner in the Code of Conduct of the Australia-China FTA, Korea-Australia FTA and Australia-Japan FTA. According to this Code, arbitrators should not let "past or existing financial, business, professional, family or social relationships or responsibilities influence the arbitrators' conduct and responsibilities."[14] Following this responsibility, arbitrators should also refrain from "entering into any relationship, or acquiring any financial interest" that may affect arbitrators' "impartiality" or "which may create an appearance of impropriety or bias."[15] In addition to that, arbitrators are also suggested to dispel the appearance that the outcome of the decision may, in some way, give benefit to them.[16]

The Code of Conduct of the Australia-China FTA imposes the responsibility on arbitrators to "avoid impropriety and the appearance of impropriety," to be "independent and impartial," to avoid "direct and indirect conflicts of interests" and to observe a "high standard of conduct so that the integrity and impartiality of the dispute settlement process are preserved."[17] The exact similar responsibility has been imposed on the panelist serving under the Korea-Australia FTA.[18] Similarly, the Australia-Japan FTA also imposes the same obligations on arbitrators.[19] Such responsibilities towards the process of dispute settlement are very important and therefore each arbitrator or panelist must adhere to them.

11 Australia-China FTA, Code of Conduct, Para 12; Korea-Australia FTA, Code of Conduct, Para 11; Australia-Japan FTA; Code of Conduct, Para III (c) and VI (1).
12 Australia-China FTA, Code of Conduct, Para 13; Korea-Australia FTA, Code of Conduct, Para 12; Australia-Japan FTA, Code of Conduct, Para VI (1).
13 Australia-China FTA, Code of Conduct, Para 15; Korea-Australia FTA, Code of Conduct, Para 14; Australia-Japan FTA, Code of Conduct, Para VI (4).
14 Australia-China FTA, Code of Conduct, Para 16; Korea-Australia FTA, Code of Conduct, Para 15; Australia-Japan FTA, Code of Conduct, Para VI (1).
15 Australia-China FTA, Code of Conduct, Para 17; Korea-Australia FTA, Code of Conduct, Para 17; Australia-Japan FTA, Code of Conduct, Para VI (2).
16 Australia-China FTA, Code of Conduct, Para 18; Korea-Australia FTA, Code of Conduct, Para 14; Australia-Japan FTA, Code of Conduct, Para VI (4).
17 Australia-China FTA, Code of Conduct, Para 2.
18 Korea-Australia FTA, Code of Conduct, Para 1.
19 Australia-Japan FTA, Code of Conduct, Para VI (1).

The Code of Conduct of the Australia-China FTA, Korea-Australia FTA and Australia-Japan FTA imposes self-disclosure obligations on arbitrators from the time they are invited to sit on a panel to resolve a dispute.[20] Arbitrators are required to disclose "any interests, relationship or matter that is likely to affect his or her independence or impartiality or that might reasonably create an appearance of impropriety or bias in the proceedings."[21] Moreover, it is an obligation on the candidate for arbitration to make "all reasonable efforts to become aware of any such interests, relationships and matters."[22] Such obligation is a continuous one, which is applicable even during the arbitration process. Therefore, arbitrators are required to make their own "reasonable efforts to become aware of any interest, relationships and matters and disclose them to the FTA Joint Commission."[23] However, it does not say whether arbitrators are required to report to the Joint Commission or Committee promptly or as soon as they come to know about any interest, relationships and matters that may affect their independence and impartiality. As a matter of common practice, the reporting should be prompt and take place as soon as such knowledge is acquired. The Australia-Japan FTA does not have any provision of reporting to the Joint Committee or Commission. In these FTAs, it is to note that the code of conduct is not putting any obligation on parties to find out about any conflict, but the onus is on arbitrators, so that in the future, arbitrators may not argue that such information was already known to the parties either directly and indirectly or was available in the public domain.

The Australia-Japan FTA has also warned that the application of these disclosure requirements should not be made administratively so burdensome that it becomes impracticable for qualified persons to serve as arbitrators. Another point of caution has been suggested in the Australia-Japan FTA that while meeting the disclosure requirements, the personal privacy of arbitrators should be respected.[24] In this respect, the Australia-Japan FTA has set the good trend that requirements of disclosure must not transgress into the personal and private domain of arbitrators.

Maintenance of confidentiality by arbitrators and parties

There is a general obligation of confidentiality in all the three FTAs under discussion here. With regard to the obligation of confidentiality, in the Australia-China FTA, the only exception is that an arbitrator or former arbitrator may only disclose confidential information as required by legal or constitutional requirements.[25] Legal obligations are common as an exception to the confidentiality requirement; however, inclusion of "Constitutional" requirements is new. Neither China nor Australia has ever included code of conduct in their FTAs. Inclusion of Constitutional requirements may be significant for Australia, but the same is not true in China. In the Chinese Constitution, there is no particular provision binding on arbitrators. However, in Australia, Constitution plays a significant role

20 Australia-China FTA, Code of Conduct, Para 3; Korea-Australia FTA, Code of Conduct, Para 2; Australia-Japan FTA, Code of Conduct, Para IV.
21 Australia-China FTA, Code of Conduct, Para 3; Korea-Australia FTA, Code of Conduct, Para 2.
22 Australia-China FTA, Code of Conduct, Para 3; Korea-Australia FTA, Code of Conduct, Para 2.
23 Australia-China FTA, Code of Conduct, Para 4; Korea-Australia FTA, Code of Conduct, Para 3. It is to note that there is a terminological difference here because in the Korea-Australia FTA there is a Joint "Committee" and not the Joint "Commission".
24 Australia-Japan, Code of Conduct, Para IV (3).
25 Australia-China FTA, Code of Conduct, Para 21.

in dispute settlement. Parties more frequently, unlike China, refer to the Constitutional provisions in court cases.

The Korea-Australia FTA does not include "Constitutional" requirements. The panelists or former panelists can only disclose the deliberations of the panel or views of an individual panelist as "required by law."[26] The panelists, as well as the person retained by the panel, are required to maintain the confidentiality of panel proceedings and deliberations.[27] It is a significant departure from the Australian point of view between the two FTAs signed with China and Korea. Since Korea is a civil law country, the use of Constitution in disputes may not be frequent, but there is no explanation for the presence of Constitutional requirements in the Australia-China FTA, considering China is a civil law country, too. It is also unexplainable as to why Australia prefers inclusion of Constitutional requirements in the Australia-China FTA and ignores the same in the Korea-Australia FTA, knowing both China and Korea are civil law countries.

The Australia-Japan FTA provides for absolute confidentiality, because even under legal or Constitutional order, any covered person, such as arbitrators, arbitrators' assistants and administrative personnel, is not allowed to disclose confidential information. Unlike the Australia-China FTA and Korea-Australia FTA, there are no exceptions, e.g., "except as required by legal or constitutional requirements." Moreover, the Australia-Japan FTA does not impose confidentiality obligation on former arbitrators, as they are obliged to maintain confidentiality under the Australia-China FTA and Korea-Australia FTA.

Arbitrators are obliged to keep a nonpublic document confidential or even cannot use it for the purpose other than the arbitration proceeding. It is also imperative that arbitrators do not use such information for their own benefit or for the advantages of others or even to adversely affect the interest of others.[28] In the Australia-Japan FTA, prohibition against the use of confidential information does not include "interest of others" and, in that sense, if any confidential information is used to affect the interests of others, then it is debatable whether it is against the code of conduct.[29] The Korea-Australia FTA is similar to the Australia-China FTA, which prohibits the use of confidential information that may affect the interests of others.[30]

Arbitration proceedings, including hearings and deliberations, as well as documents submitted for the purpose of arbitration, are confidential.[31] Not all documents can be confidential, only those documents that are marked confidential by the party providing that they are treated as confidential by the other party. However, the party submitting confidential information to the tribunal may have to submit a nonconfidential summary of the designated confidential information within 15 days of such a request. This nonconfidential information may be made public.[32] The Australia-China FTA has made it clear that the documents submitted for arbitration may be confidential, and the obligation to keep that information confidential is on the receiving party and not on the party providing

26 Korea-Australia FTA, Code of Conduct, Para 20.
27 Korea-Australia FTA, Rules of Procedure, Para 8.
28 Australia-China FTA, Code of Conduct, Para 19.
29 Australia-Japan FTA, Code of Conduct, Para VII (1).
30 Korea-Australia FTA, Code of Conduct, Para 18.
31 Australia-China FTA, Model Rules, Para 17. As the hearings of the arbitral tribunal is in close session and in deliberation only arbitrators are present so these parts of the arbitration proceeding are also confidential. See Australia-China FTA, Model Rules, Paras 9 &13.
32 Australia-China FTA, Model Rules, Para 17.

that confidential information. Therefore, the party providing that information may make that information, i.e., its own position, public, and that will not be considered breach of confidentiality obligation. It is also to note that only documents submitted in arbitration are confidential, whereas any document prepared for arbitration or related to arbitration is not within the scope of the confidential obligations.

In the Korea-Australia FTA, a party may designate any specific information confidential that it considers strictly necessary to protect privacy or legitimate commercial interest of particular enterprises, public or private, or to address essential confidentiality concerns.[33] Therefore, the scope of confidentiality has been extended to private and legitimate commercial interest in the Korea-Australia FTA.

Conduct of arbitration proceedings

The Australia-China FTA, Korea-Australia FTA and Australia-Japan FTA provide for the duties and performance-related code for arbitrators.[34] The first duty is to conduct arbitration proceedings "with fairness and diligence."[35] No arbitrator is allowed "to deny other arbitrator from taking part in any aspect of the proceeding."[36] This may also include the deliberation process. It should be the responsibility of the Chairman to make sure that all arbitrators are included in the process from the beginning till the end. There is no such provision in the Australia-Japan FTA; however, it may be assumed that all arbitrators will take part in the decision-making process. The Australia-Japan FTA assumes that each arbitrator understands that "prompt settlement of disputes is essential to the effective functioning of the Australia-Japan FTA".[37]

Arbitrators are not allowed "to delegate their duties of making decision on any other person."[38] In the Australia-Japan FTA, the same obligation is included; however, the arbitral tribunal may permit arbitrators' assistants, administration personnel, interpreters and translators to be present during its deliberations.[39] This is because the Code of Conduct allows delegation of "duty to decide" to any person "except as provided in the Rules of Procedures."[40] However, the Rule of Procedures only allows covered persons to be present during deliberation; it may not be assumed that the covered person will make the final decision.

This obligation of non-delegation is quite significant in terms of the rumours that arbitrators ask their assistants to draft the award. The controversial Yukos award has been challenged by Russia, on the basis that the assistant to the tribunal spent more hours and was paid for those hours, which was more than the time spent by the arbitrators, suggesting that perhaps the assistant was asked to draft the award, which was the duty of the arbitral panel.[41]

33 Korea-Australia FTA, Model Rules Para 21.
34 Australia-China FTA, Code of Conduct, Paras 5–11; Korea-Australia FTA, Code of Conduct, Paras 4–10; Australia-Japan, Code of Conduct, Para V (1–5).
35 Australia-China FTA, Code of Conduct, Para 6; Korea-Australia FTA, Code of Conduct, Para 5; Australia-Japan, Code of Conduct, Para V (2).
36 Australia-China FTA, Code of Conduct, Para 7; Korea-Australia FTA, Code of Conduct, Para 6.
37 Australia-Japan FTA, Code of Conduct, Para V (1).
38 Australia-China FTA, Code of Conduct, Para 8; Korea-Australia FTA, Code of Conduct, Para 7.
39 Australia-Japan FTA, Rules of Procedure, Para 18.
40 Australia-Japan FTA, Code of Conduct, Para V (4).
41 Dmytro Galagan, "The Challenge of the Yukos Award-An Award Written by Someone Else-A Violation of Tribunal's Mandate?", Kluwer Arbitration Blog, available at http://kluwerarbitration

In arbitration, if the tribunal requires or a party requests, an expert may be engaged to assist the tribunal to reach a conclusion. The expert can be an individual or a body. The parties will agree on the terms and conditions for engagement of the expert. Any technical information or views of the expert so obtained by the tribunal must be provided to the parties also for comments.[42] This is, of course, to maintain the due process within the arbitration proceeding.

Use of Indicative Time Table

The Australia-China FTA provides for a clear timeline for the operation of a dispute resolution process. In order to strengthen the importance of time limit and timely execution of various activities, an "Indicative Time Table for the Arbitral Tribunal" is also added as an Annex 15-B attached with the "Model Rules of Procedure for the Arbitral Tribunal."[43] An outer limit for the completion of a dispute resolution procedure is set at 270 days "from the date of establishment of the arbitral tribunal until the issuance of the final report."[44] This time limit is a general rule, and parties with agreement may change the number of days. If the general rule is adhered to, then it is possible to resolve disputes faster under the Australia-China FTA, as compared to any other forum.

A similar trend is also noticed in the Korea-Australia FTA, which includes an Indicative Time Table for Dispute Settlement Panel, attached to the Model Rules of Procedure for Dispute Settlement Panel Proceedings.[45] According to this time table, a final report is expected to be issued between 170 and 240 days from the date of establishment of the panel. However, the upper limit of deadline for the issuance of final report is 270 days, which is the same as that of the Australia-China FTA.[46]

The Indicative Time Table in the Australia-Japan FTA is even shorter than that of the Korea-Australia FTA. In the Australia-Japan FTA, a period of 23–26 weeks is given, which is approximately 161–182 days from the date of establishment of the tribunal to release the award to the parties.[47] At the same time, Proceedings of Arbitral Tribunal declares that the maximum days to issue the award to the parties must not be more than 6 months, which is approximately 180 days.[48] Therefore, in terms of number of days, arbitrators have less time under the Australia-Japan FTA as compared to the Australia-China FTA and Korea-Australia FTA. From the parties' point of view, the tribunal can decide a dispute faster in the Australia-Japan FTA. All these dates are, of course, a general guideline and with the agreement of the parties, it can be extended.[49]

A time period for the written submissions and documents is also set under the Australia-China FTA. For example, the complaining party is required to submit its first

blog.com/2015/02/27/the-challenge-of-the-yukos-award-an-award-written-by-someone-else-a-violation-of-the-tribunals-mandate/.

42 Australia-China FTA, Model Rules, Para 20; Korea-Australia FTA, Model Rules, Para 26.
43 See Annex 15-B of Australia-China FTA.
44 Australia-China FTA, Model Rules, Para 2.
45 See Annex 20-B of Korea-Australia FTA.
46 Korea-Australia FTA, Model Rules, Para 2 and Annex 20-B.
47 Australia-Japan FTA, Indicative Time Table, Attachment A.
48 Australia-Japan FTA, Para 19.9 (6).
49 Australia-China FTA, Model Rules, Para 2; Korea-Australia FTA, Model Rules, Para 2; Australia-Japan FTA, Article 19.9 (6).

written document within 14 days from the date of appointment of the final arbitrator, and the party complained against is then supposed to submit its reply within 30 days from the date of delivery of the first written submission by the complaining party.[50] The complaining party, in the Korea-Australia FTA, also has 14 days to make its written submission, but the respondent has only 21 days.[51] In the Australia-Japan FTA, both the complaining party and the party complained against have a shorter time, i.e., 10 days and 20 days, respectively.[52]

It may seem unreasonable to give less time to the complaining party as compared to the party complained against. However, this may not be the case, as the complaining party might have prepared and already submitted most of the information regarding the dispute at the time of filing the notice for consultation and for the request for the establishment of the panel to resolve the dispute. Therefore, a lesser time period given to the complaining party is justified.

The arbitral tribunal, in the Australia-China FTA, is obligated to commence hearing 30 days after the submission of the party complained against.[53] The initial report also needs to be issued 30 days after the receipt of the written supplementary submissions by the parties.[54] That means that the tribunal has to work at a fast pace to complete the writing of the report. Parties are also required to react faster, as they are given only 10 days to make written comments on the initial report.[55] Thereafter, the tribunal gets only 20 days to make the final report to the parties.[56]

The process is even faster in the Korea-Australia FTA, as the tribunal fixes the first hearing with parties within 20–45 days, and the initial report is issued 60–90 days thereafter. However, parties get more days (14 days) to give their comments on the initial report, as compared to the Australia-China FTA. The final report is made available to the parties in 31 days.[57] As a general rule, in the Korea-Australia FTA, the panel is bound to give "sufficient time to the parties to prepare their submissions."[58]

The arbitration process is very fast in the Australia-Japan FTA; therefore, all time limits are shorter, as compared to the Australia-China FTA and Korea-Australia FTA. However, in the Australia-Japan FTA, parties get two substantive hearings, whilst in the Australia-China FTA and Korea-Australia FTA, parties get only one hearing.[59] In the Australia-China FTA, however, parties are allowed to provide written supplementary submissions after the first hearing.[60] Though the time limit is very short in the Australia-Japan FTA, the time period to give comments on the draft award is longer, i.e., 15 days, as compared to the Australia-China FTA (10 days) and Korea-Australia FTA (14 days). The final award in the Australia-Japan FTA is issued to the parties in 15 days after the

50 Australia-China FTA, Model Rules, Para 4.
51 Korea-Australia, Model Rules-Indicative Time-Table, Para (a).
52 Australia-Japan FTA, Indicative Time-Table, Para (b).
53 Australia-China FTA, Model Rules-Indicative Time-Table, Para 2.
54 Australia-China FTA, Model Rules-Indicative Time-Table, Para 4.
55 Australia-China FTA, Model Rules-Indicative Time-Table, Para 5.
56 Australia-China FTA, Model Rules-Indicative Time-Table, Para 6. The time limit is 30 days from the date of issuance of the initial report which includes 10 days for the comments to receive from the parties.
57 Korea-Australia FTA, Model Rules-Indicative Time-Table, Annex 20-B.
58 Korea-Australia FTA, Model Rules, Para 3.
59 Australia-Korea FTA, Indicative Time-Table, Annex A, Paras c & e.
60 Australia-China FTA, Model Rules, Indicative Time-Table, Para 3.

submission on their comments, which is faster than the Australia-China FTA (20 days) and Korea-Australia FTA (31 days).

Presence of arbitrators in hearings and deliberations

All arbitrators in the hearings and deliberations under the Australia-China FTA are required to be present, even though assistants, translators and designated note-takers may be present during the hearings who are not allowed to take part in the deliberations.[61] In the Korea-Australia FTA, assistants, interpreters or translators or designated note-takers may be present in the hearings, and with the permission of the parties, they may also be present in deliberations.[62] In the Australia-Japan FTA, the tribunal may permit the presence of arbitrators' assistants, administration personnel, interpreters and translators during deliberations.[63] For this purpose, the tribunal in the Australia-Japan FTA may not be required to consult parties. Therefore, whilst the Australia-China FTA allows assistants, note-takers, interpreters and translators only during hearings but not in deliberations, the Korea-Australia FTA allows them to be present in deliberations (and assumed to be present during hearings, too). However, according to the Australia-Japan FTA, the tribunal on its own may allow those people to be present during deliberations and assume that they are allowed to be present during hearings; this is also similar to the situation in the Korea-Australia FTA.

All the meetings of the tribunal must be presided over by the Chair of the Tribunal. Other arbitrators may delegate authority to the Chair to deal with administrative and procedural decisions.[64] Such delegation of the authority is good for the efficiency of the arbitral tribunal to resolve disputes in a speedy matter. There are several administrative and procedural decisions that are important that can be taken by the Chair alone, without involving other arbitrators.

In the Australia-China FTA, arbitral hearings are not mandatory. They can only be organised if parties agree to an oral hearing.[65] In case the oral hearing is arranged, the tribunal must ensure an equal amount of time for each party.[66] The Chair of the Tribunal fixes the time limit with a view to providing equal time to parties.[67] It is to note that due process is satisfied by giving an equal amount of time, and there is no obligation to provide a "reasonable," "full" or "adequate" opportunity to present the case. At the hearing, first the complaining party is given the opportunity to make its argument, followed by arguments of the party complained against. After the main arguments, the complaining party is given time to make a reply, followed by a counter-reply by the party complained against.[68]

61 Australia-China FTA, Model Rules, Para 9.
62 Korea-Australia FTA, Model Rules, Para 7.
63 Australia-Japan FTA, Rules of Procedure, Para 18.
64 Australia-China FTA, Model Rules, Para 10; Korea-Australia FTA, Model Rules, Para 5; Australia-Japan FTA, Rules of Procedure, Para 16.
65 Australia-China FTA, Model Rules, Para 12.
66 Australia-China FTA, Model Rules, Para 14.
67 Australia-China FTA, Model Rules, Para 14.
68 Australia-China FTA, Model Rules, Para 14.

Language in arbitration

Chinese is the language of China, and English is the language of Australia, but the Australia-China FTA includes English as the working language of the arbitral proceeding. This is not a strange provision, considering China has agreed to use English as the working language in other FTAs that it has signed.

The Australia-Japan FTA provides use of dual language in arbitration. It provides that the proceedings of the arbitral tribunal are to be conducted in both English and Japanese. The same condition is also applicable on oral and written submissions.[69] It is the obligation on a party to provide translation of the written submission in the language of the other party and consequently bear the cost of translation.[70] In other words, if Australia submits a document in English, then it has to get that document translated into Japanese and also bear the cost of the translation. However, the cost of interpretation is borne by the parties in equal share. For the purpose of interpretation, the Australia-Japan FTA provides a general rule that the party in whose capital a meeting is held will be responsible for organising interpretation services for the meeting.[71] One may argue that the use of dual languages may delay the process; at the same time, it may also be argued that a proceeding in a native language of the parties may result in a well-informed decision. China and Korea also have language differences with Australia, but those two countries have not agreed to the dual languages proceeding with Australia.

Venue of hearing

It is believed that parties in a dispute may enjoy the local advantage if the venue of the hearing is set in their country. This presumption is dispelled in the Australia-China FTA. The parties' agreement is respected in the Australia-China FTA, so the first method of deciding the venue of the hearing is through parties' agreement. If, for some reasons, parties cannot agree on the venue of the arbitration hearing, then as default rule, the first hearing will be conducted in the territory of the parties complained against. The second hearing and any further hearings thereafter will be conducted alternatively in the territories of the parties. In other words, the second hearing will be conducted in the territory of the complaining party, and the third hearing will be organised in the territory of the party complained against.[72] A similar approach has been adopted in the Korea-Australia FTA, too.[73] However, the decision on the venue of the meeting has been left to the Chair in the Australia-Japan FTA to decide in consultation with the parties and other arbitrators.[74] There is no default rule on venue in the Australia-Japan FTA, similar to the Australia-China FTA and Australia-Japan FTA.

Considering the size of China and Australia, parties still have to agree on the venue, for example, whether the venue of the hearing should be in the capital or any other place. The Model Rules in the Australia-China FTA do not shed any light on that. Therefore, for all practical purposes, both Australia and China have to agree on a venue. The only innovation

69 Australia-Japan FTA, Rules of Procedure, Para 37.
70 Australia-Japan FTA, Rules of Procedure, Para 38.
71 Australia-Japan FTA, Rules of Procedure, Para 39.
72 Australia-China FTA, Model Rules, Para 22.
73 Korea-Australia FTA, Model Rules, Para 29.
74 Australia-Japan FTA, Rules of Procedure, Para 4.

one can note in this provision is that the venue is not limited to the capital city; rather, it could be organised anywhere within the territory of a party. Depending upon the nature of the dispute, sometimes it would be helpful to organise the hearing at a place that has more evidence of the measures in dispute.

Implications of violations of the Code of Conduct

Violation of the Code of Conduct by an arbitrator is itself a determinable matter; therefore, no arbitrator is allowed to "communicate matters concerning actual or potential violations."[75] If the matter is necessary to ascertain whether an arbitrator has violated or may violate the Code of Conduct, then an arbitrator may communicate such matter, otherwise that arbitrator has to inform both parties. This is perhaps for the purpose of maintaining the integrity of the questionable arbitrator, unless the FTA Joint Committee of the Australia-China FTA or Korea-Australia FTA, as the case may be, finally resolves the matter. China, Korea and Japan have set the trend of making the violation of code of conduct itself a disputable ground.

Arbitrators in a commercial arbitration are familiar with such codes, but the same arbitrators may not be compelled to follow such codes when deciding State v State disputes under FTAs. Now, with the inclusion of the Code of Conduct in the Australia-China FTA, Korea-Australia FTA and Australia-Japan FTA, arbitrators will be bound by the code, and violation of this code may lead to removal of arbitrators.

Conclusion

China, South Korea and Japan have set a new and positive trend in the dispute settlement mechanism of their FTAs. The most important trend is to include the Code of Conduct for arbitrators in the dispute settlement system. This Code of Conduct is a package, which covers independence, impartiality and other necessary measures that are important for maintaining the integrity of the dispute-resolution mechanism. In the commercial arbitration world, such measures are common and have been in use for a long time; however in the FTA dispute-resolution system, such measures were not used until recently. In other words, arbitrators under the FTA dispute settlement system were not under strict scrutiny, as compared to any commercial arbitration. The whole Code of Conduct is binding on arbitrators, which is a very positive development, but the rule relating to self-disclosure is far more important. According to this rule, the obligation is on the arbitrator to disclose any situation of actual or apparent bias and not on the parties. From the parties' perspective, this is a big relief. In this regard, it is also important to note that the personal and private information of arbitrators should not be of public scrutiny. Therefore, Japan has made it clear that the obligations of self-disclosure on arbitrators should not be administratively cumbersome and go beyond its purpose, so that a qualified person may not be able to perform the main duty of resolving disputes. In essence, a fine balance should be maintained for this purpose. Separate Model Rules of Procedures for arbitration are another significant development in the FTAs of China, South Korea and Japan, which provide default rules for arbitration, unless parties agree otherwise. In

75 Australia-China FTA, Code of Conduct, Para 11; Korea-Australia FTA, Code of Conduct, Para 10. Australia-Japan FTA, Code of Conduct, Para V(5)

the FTA dispute settlement system, earlier emphasis was not put on rules of procedure, but rather, it was left open for the tribunal to design or adopt them in consultation with parties. The default rules are now available for the arbitral tribunal to follow, which has been negotiated between the parties. The presence of default rules in the FTAs of China, South Korea and Japan will help develop a consistent application of rules in any arbitration under the respective FTAs. Similarly, an Indicative Time Table sets the clock right from the beginning for the parties, as well as for the Tribunal, to resolve the disputes in a timely manner. From a logistics point of view, the Time Table is easy to refer to now, as compared to the past. In the earlier FTAs, one could only calculate the time period by reading various provisions in the FTAs. From the users' point of view, one may quickly compare as to which FTAs may help resolve the dispute in a timely manner. Arbitrators will also be mindful of the time limit before they accept appointment. Otherwise, in commercial arbitration or in investment arbitration, delay in issuing the award has become very common. Finally, use of cooperation as the means of dispute resolution has become the hallmark of Asian FTAs, particularly those of China and South Korea. From an Asian perspective, cooperation between disputants is always appreciated in resolving their disputes. However, it is not settled yet, the legal implication of this cooperation provision as to whether any violation of this obligation may give rise to any cause of action or not.

It has been argued that proliferation of FTAs may have an impact on the domestic courts in the administration of justice. Similar arguments have been raised about the impact of the World Trade Organisation (WTO) on domestic jurisdiction, which is a valid point. This is because, as a member of the WTO, all members are required to align their domestic rules with the WTO rules. For example, law on intellectual property rights, anti-dumping and so on are a few examples that forced every members of the WTO to amend their local laws in line with the WTO rules. China is one example, which has to amend more than a thousand legislations and rules to bring them in line with the WTO requirements. If there is any violation of WTO rules, then a member of the WTO may initiate dispute against the member who is alleged to violate WTO rules. The general impact of FTA on domestic legislation has not been evident. One may see the change in rules in favour of FTA partners. For example, change in rules of origin, lower threshold for establishing service companies and so forth may have been put in place in light of specific FTAs. To this extent, one may argue that FTAs have some impact on domestic legislations. At the same time, it should be noted that such favourable treatment to a FTA partner is allowed under the WTO, and it is not considered as the violation of Most Favoured Nation (MFN) principle. Disputes under FTAs are not common. In Asia, no bilateral FTA has been invoked yet for a formal dispute settlement. However, a rule-based dispute settlement system in a FTA gives predictability about how a dispute might be resolved as and when that may arise.

With these new trends in action, one may conclude that China, South Korea and Japan are developing a new Asian style of dispute resolution mechanism in their FTAs, whether signed with developed or developing countries.

16 Emerging trends in the dispute settlement mechanism in the Free Trade Agreements of China, South Korea and Japan

Rajesh Sharma[1]

Asian countries jumped on the bandwagon signing Free Trade Agreements (FTAs) at a considerably fast speed, after the collapse of the Ministerial Meeting of the World Trade Organization (WTO) at Cancun in 2003. The Asian economic drivers like China and India were new in this journey. ASEAN countries, on the other hand, were focusing on establishing their ASEAN free trade zone, which was in the early stages of development. At the same time, ASEAN started negotiating with China, Japan and South Korea to form an ASEAN+3 Agreement. India also joined the same club by forming an extended ASEAN+4. Among Asian countries, Singapore, Japan and South Korea started negotiating and signing FTAs with other economically developed countries, like the US and the EU. These countries were considered as like-minded countries, so FTAs with them were a natural course of action. Otherwise, the rest of the Asian countries were moving slowly in signing FTAs. Once China started flexing its economic prowess, the FTAs negotiation and conclusion started taking new turns. This was further fuelled by the commencement of negotiations on East Asian Communities (EAC) envisaging the EU-type communities for the Asian Countries.

The EAC negotiations were conducted on the sidelines of the ASEAN meetings. However, soon, the EAC negotiations faced a stumbling block on the issue of leadership, the definition of Asia, mainly in terms of coverage of Asian countries within the EAC, including whether Australia and New Zealand should be part of the EAC or not, and above all, on security concerns. This inclusion issue went beyond its anticipation when Russia requested to join the EAC as a member, or at least, as an observer. Now, the discussion on the EAC has become a mere event on the side of the ASEAN meetings. Once the EAC negotiation started to cool down, the Asian countries started negotiating separately with developed and developing countries, including those in Africa and Latin America. From Asia, the target countries were China, Japan, South Korea, India, Malaysia, Indonesia and Singapore. Australia and New Zealand also started FTA negotiations with these countries.

Over a period of time, Asian countries started negotiating their FTAs in more sophisticated ways, as compared to their earlier approach of negotiating on the basis of the text prepared by the other parties, mainly by the developed countries. New approaches of Asian countries have shown new innovations in their FTAs provisions. What was considered an unfeasible task has started becoming a reality. New experiments have been made. This chapter focuses on these new experiments and trends emerging from the State-to-State dispute settlement

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provisions of the FTAs of Asia. For this purpose, recently signed FTAs of China, South Korea and Japan with Australia will be considered. These three countries are powerful economies of Asia, and their approach in the dispute settlement in their FTAs can be considered as representative of the Asian trend. The FTAs under consideration in this chapter have also raised discussions on the Investor-State dispute settlement mechanism. For example, the Australia-China FTA has proposed to negotiate an appellate mechanism for Investor-State disputes, which is very innovative, and a hot topic in the international arena. However, as the focus of this chapter is on State-to-State dispute settlement, discussion on Investor-State disputes is beyond the scope of this chapter.

FTAs of China, South Korea and Japan with Australia

The Australia-China FTA was signed on 17 June 2015 and became effective on 20 December 2015. The Australia-China FTA is the newest FTA of China, which represents a new trend in the dispute settlement mechanism of China.

Chapter 15 of the Australia-China FTA contains the State-to-State dispute settlement mechanism. In addition to the main provisions, this chapter includes three new items: (1) Code of Conduct (Annex-15-A), (2) Model Rules of Procedure for the Arbitral Tribunal (Annex-15-B) and (3) Indicative Time Table for the Arbitral Tribunal attached with Annex B (Annex 15-B). Code of Conduct, Model Rules and Time Table have now become part of the FTA applicable to the State v State disputes. Among these three, the Code of Conduct for Arbitrators has been used for the first time.

The Korea-Australia FTA was signed on the 8 April 2014 and became effective on 12 December 2014. Like the Australia-China FTA, the Korea-Australia FTA also shows some new trends in dispute settlement. The Korea-Australia FTA also includes a Code of Conduct (Annex 20-A), Model Rules of Procedure (Annex 20-B) and an Indicative Time Table for a Dispute Settlement Panel as part of the Model Rules of Procedure for Dispute Settlement Panel Proceedings (Attachment to Annex 2-B). From the structural point of view, the dispute settlement mechanisms of both the Australia-China FTA and the Korea-Australia FTA look similar, as Australia is the common partner in both the FTAs. Both FTAs were signed in close proximity, so one may see the influence of one on the other.

The other major Asian economy, Japan, has also signed an agreement with Australia, which included the Code of Conduct in its dispute settlement mechanism.[2] In contrast with Korea and China, the Australia-Japan FTA requires not only arbitrators or panelists but also assistants and administrative personnel to comply with the Code of Conduct.[3] The Obligation of Self-Disclosure contained in the Code of Conduct is exclusively applicable on arbitrators.[4]

The Code of conduct imposes a duty on arbitrators to remain independent and impartial[5] and stresses the performance of duties by arbitrators[6] and maintenance of

2 The Australia-Japan FTA was signed on 8 July 2014 and became effective on 15 January 2015.
3 Australia-Japan FTA, Rules of Procedure of Arbitral Tribunals, Para 6.
4 Section IV of the Code of Conduct of the Australia-Japan FTA contains the provisions of Obligation of Self-Disclosure.
5 Australia-China FTA, Code of Conduct, Paras 12–17; Korea-Australia FTA, Code of Conduct Paras 11–16.
6 Korea-Australia FTA, Code of Conduct, Paras 4–10; Australia-China FTA, Code of Conduct, Paras 5–11.

confidentiality.[7] As these obligations are important in maintaining the integrity of the dispute settlement system, these obligations are included in both the Australia-China FTA and the Korea-Australia FTA through the Code of Conduct. The Australia-Japan FTA enforces the Code of Conduct on arbitrators, arbitrators' assistants and administrative personnel, thus, the coverage of the Code of Conduct is wider as compared to the Australia-China FTA and the Australia-Korea FTA.

Cooperation – a new means of dispute resolution

The Australia-China FTA follows the consistent pattern of China for the dispute settlement mechanism in the FTAs of Asia, which encourages "cooperation" as the first means of resolving disputes and obliges the parties to "make every attempt through cooperation to arrive at a mutually satisfactory resolution of any matter that might affect" the operation of the Australia-China FTA including the agreement on "the interpretation and application of this Agreement."[8] The importance of cooperation as the first port of call may be assessed by the fact that the recently concluded Trans-Pacific Partnership (TPP) also emphasises "cooperation."[9]

The Korea-Australia FTA has also emphasised "cooperation" and requires parties to "endeavour to agree" on the interpretation and implementation of the FTA. Similar to the Australia-China FTA, the parties to the Korea-Australia FTA also have to "make every attempt through cooperation" to arrive at a mutually satisfactory resolution of any matter that might affect the operation of the Korea-Australia FTA.[10]

The Australia-Japan FTA does not have any stand-alone provision on cooperation, like the Australia-China FTA or the Korea-Australia FTA. However, the Australia-Japan FTA has "Good Offices, Conciliation and Mediation," and the Australia-China FTA has "Good Offices, Conciliation and Mediation," together with a cooperation provision. The Korea-Australia FTA does not have "Good Offices, Conciliation and Mediation." Though the Australia-Korea FTA shows the trend of including cooperation as a means of resolving disputes, at the same time excluding the means of "Good Offices, Conciliation and Mediation," it is still too early to say whether this will be a future trend. It is also a fact that almost every FTA includes "Good Offices, Conciliation and Mediation"; however, the use of this method for dispute resolution is insignificant. Even at the level of WTO, the method of "Good Offices, Conciliation and Mediation" is seldom used.

Though we see the use of cooperation in the dispute settlement mechanism of FTAs now, it is too early to understand the implication of this provision. For example, is it an obligation that, if breached, may give rise to an action under the FTA? In other words, if parties do not cooperate during consultation or at a post-award phase, e.g., for fixing of a reasonable period of time, would that mean the cooperation provision has been violated by the recalcitrant party and therefore the claimant may initiate another action against the party at fault? What standard should be used to ascertain whether a party has breached the cooperation obligations or not whenever the tribunal does face such a question? Considering the general approach of Asian countries to resolve the dispute amicably, the inclusion of cooperation

7 Australia-China FTA, Code of Conduct, Paras 19–21; Korea-Australia FTA, Code of Conduct, Paras 18–20.
8 Australia-China FTA, Article 15.1.
9 TPP, Article 28.2
10 Korea-Australia FTA, Article 20.1.

as the first port of call for dispute resolution is laudable, but for the rule-based system of dispute resolution, this is far from complete and practical.

Independence and impartiality of arbitrators

Independence and impartiality in any decision-making process is a very important aspect. Therefore, the Code of Conduct in the Australia-China FTA, Korea-Australia-FTA and Australia-Japan FTA has paid special attention to it and provided a general obligation on the arbitrators to be "independent and impartial," to act in a "fair manner" and to avoid "creating an appearance of impropriety or bias".[11] It further adds that an arbitrator must not be influenced by self-interests, outside pressure, political considerations, public clamour, loyalty to a party or fear of criticism.[12] Arbitrators are also required to take action in such a manner that it should not give any indication that people at a special position influence them. In order to counter that impression, arbitrators are required to make every effort to displace such an impression. Moreover, arbitrators are not allowed to use their position on the arbitral tribunal to advance any personal or private interests.[13]

Past dealings of arbitrators are also under the scanner in the Code of Conduct of the Australia-China FTA, Korea-Australia FTA and Australia-Japan FTA. According to this Code, arbitrators should not let "past or existing financial, business, professional, family or social relationships or responsibilities influence the arbitrators' conduct and responsibilities."[14] Following this responsibility, arbitrators should also refrain from "entering into any relationship, or acquiring any financial interest" that may affect arbitrators' "impartiality" or "which may create an appearance of impropriety or bias."[15] In addition to that, arbitrators are also suggested to dispel the appearance that the outcome of the decision may, in some way, give benefit to them.[16]

The Code of Conduct of the Australia-China FTA imposes the responsibility on arbitrators to "avoid impropriety and the appearance of impropriety," to be "independent and impartial," to avoid "direct and indirect conflicts of interests" and to observe a "high standard of conduct so that the integrity and impartiality of the dispute settlement process are preserved."[17] The exact similar responsibility has been imposed on the panelist serving under the Korea-Australia FTA.[18] Similarly, the Australia-Japan FTA also imposes the same obligations on arbitrators.[19] Such responsibilities towards the process of dispute settlement are very important and therefore each arbitrator or panelist must adhere to them.

11 Australia-China FTA, Code of Conduct, Para 12; Korea-Australia FTA, Code of Conduct, Para 11; Australia-Japan FTA; Code of Conduct, Para III (c) and VI (1).
12 Australia-China FTA, Code of Conduct, Para 13; Korea-Australia FTA, Code of Conduct, Para 12; Australia-Japan FTA, Code of Conduct, Para VI (1).
13 Australia-China FTA, Code of Conduct, Para 15; Korea-Australia FTA, Code of Conduct, Para 14; Australia-Japan FTA, Code of Conduct, Para VI (4).
14 Australia-China FTA, Code of Conduct, Para 16; Korea-Australia FTA, Code of Conduct, Para 15; Australia-Japan FTA, Code of Conduct, Para VI (1).
15 Australia-China FTA, Code of Conduct, Para 17; Korea-Australia FTA, Code of Conduct, Para 17; Australia-Japan FTA, Code of Conduct, Para VI (2).
16 Australia-China FTA, Code of Conduct, Para 18; Korea-Australia FTA, Code of Conduct, Para 14; Australia-Japan FTA, Code of Conduct, Para VI (4).
17 Australia-China FTA, Code of Conduct, Para 2.
18 Korea-Australia FTA, Code of Conduct, Para 1.
19 Australia-Japan FTA, Code of Conduct, Para VI (1).

The Code of Conduct of the Australia-China FTA, Korea-Australia FTA and Australia-Japan FTA imposes self-disclosure obligations on arbitrators from the time they are invited to sit on a panel to resolve a dispute.[20] Arbitrators are required to disclose "any interests, relationship or matter that is likely to affect his or her independence or impartiality or that might reasonably create an appearance of impropriety or bias in the proceedings."[21] Moreover, it is an obligation on the candidate for arbitration to make "all reasonable efforts to become aware of any such interests, relationships and matters."[22] Such obligation is a continuous one, which is applicable even during the arbitration process. Therefore, arbitrators are required to make their own "reasonable efforts to become aware of any interest, relationships and matters and disclose them to the FTA Joint Commission."[23] However, it does not say whether arbitrators are required to report to the Joint Commission or Committee promptly or as soon as they come to know about any interest, relationships and matters that may affect their independence and impartiality. As a matter of common practice, the reporting should be prompt and take place as soon as such knowledge is acquired. The Australia-Japan FTA does not have any provision of reporting to the Joint Committee or Commission. In these FTAs, it is to note that the code of conduct is not putting any obligation on parties to find out about any conflict, but the onus is on arbitrators, so that in the future, arbitrators may not argue that such information was already known to the parties either directly and indirectly or was available in the public domain.

The Australia-Japan FTA has also warned that the application of these disclosure requirements should not be made administratively so burdensome that it becomes impracticable for qualified persons to serve as arbitrators. Another point of caution has been suggested in the Australia-Japan FTA that while meeting the disclosure requirements, the personal privacy of arbitrators should be respected.[24] In this respect, the Australia-Japan FTA has set the good trend that requirements of disclosure must not transgress into the personal and private domain of arbitrators.

Maintenance of confidentiality by arbitrators and parties

There is a general obligation of confidentiality in all the three FTAs under discussion here. With regard to the obligation of confidentiality, in the Australia-China FTA, the only exception is that an arbitrator or former arbitrator may only disclose confidential information as required by legal or constitutional requirements.[25] Legal obligations are common as an exception to the confidentiality requirement; however, inclusion of "Constitutional" requirements is new. Neither China nor Australia has ever included code of conduct in their FTAs. Inclusion of Constitutional requirements may be significant for Australia, but the same is not true in China. In the Chinese Constitution, there is no particular provision binding on arbitrators. However, in Australia, Constitution plays a significant role

20 Australia-China FTA, Code of Conduct, Para 3; Korea-Australia FTA, Code of Conduct, Para 2; Australia-Japan FTA, Code of Conduct, Para IV.
21 Australia-China FTA, Code of Conduct, Para 3; Korea-Australia FTA, Code of Conduct, Para 2.
22 Australia-China FTA, Code of Conduct, Para 3; Korea-Australia FTA, Code of Conduct, Para 2.
23 Australia-China FTA, Code of Conduct, Para 4; Korea-Australia FTA, Code of Conduct, Para 3. It is to note that there is a terminological difference here because in the Korea-Australia FTA there is a Joint "Committee" and not the Joint "Commission".
24 Australia-Japan, Code of Conduct, Para IV (3).
25 Australia-China FTA, Code of Conduct, Para 21.

in dispute settlement. Parties more frequently, unlike China, refer to the Constitutional provisions in court cases.

The Korea-Australia FTA does not include "Constitutional" requirements. The panelists or former panelists can only disclose the deliberations of the panel or views of an individual panelist as "required by law."[26] The panelists, as well as the person retained by the panel, are required to maintain the confidentiality of panel proceedings and deliberations.[27] It is a significant departure from the Australian point of view between the two FTAs signed with China and Korea. Since Korea is a civil law country, the use of Constitution in disputes may not be frequent, but there is no explanation for the presence of Constitutional requirements in the Australia-China FTA, considering China is a civil law country, too. It is also unexplainable as to why Australia prefers inclusion of Constitutional requirements in the Australia-China FTA and ignores the same in the Korea-Australia FTA, knowing both China and Korea are civil law countries.

The Australia-Japan FTA provides for absolute confidentiality, because even under legal or Constitutional order, any covered person, such as arbitrators, arbitrators' assistants and administrative personnel, is not allowed to disclose confidential information. Unlike the Australia-China FTA and Korea-Australia FTA, there are no exceptions, e.g., "except as required by legal or constitutional requirements." Moreover, the Australia-Japan FTA does not impose confidentiality obligation on former arbitrators, as they are obliged to maintain confidentiality under the Australia-China FTA and Korea-Australia FTA.

Arbitrators are obliged to keep a nonpublic document confidential or even cannot use it for the purpose other than the arbitration proceeding. It is also imperative that arbitrators do not use such information for their own benefit or for the advantages of others or even to adversely affect the interest of others.[28] In the Australia-Japan FTA, prohibition against the use of confidential information does not include "interest of others" and, in that sense, if any confidential information is used to affect the interests of others, then it is debatable whether it is against the code of conduct.[29] The Korea-Australia FTA is similar to the Australia-China FTA, which prohibits the use of confidential information that may affect the interests of others.[30]

Arbitration proceedings, including hearings and deliberations, as well as documents submitted for the purpose of arbitration, are confidential.[31] Not all documents can be confidential, only those documents that are marked confidential by the party providing that they are treated as confidential by the other party. However, the party submitting confidential information to the tribunal may have to submit a nonconfidential summary of the designated confidential information within 15 days of such a request. This nonconfidential information may be made public.[32] The Australia-China FTA has made it clear that the documents submitted for arbitration may be confidential, and the obligation to keep that information confidential is on the receiving party and not on the party providing

26 Korea-Australia FTA, Code of Conduct, Para 20.
27 Korea-Australia FTA, Rules of Procedure, Para 8.
28 Australia-China FTA, Code of Conduct, Para 19.
29 Australia-Japan FTA, Code of Conduct, Para VII (1).
30 Korea-Australia FTA, Code of Conduct, Para 18.
31 Australia-China FTA, Model Rules, Para 17. As the hearings of the arbitral tribunal is in close session and in deliberation only arbitrators are present so these parts of the arbitration proceeding are also confidential. See Australia-China FTA, Model Rules, Paras 9 &13.
32 Australia-China FTA, Model Rules, Para 17.

that confidential information. Therefore, the party providing that information may make that information, i.e., its own position, public, and that will not be considered breach of confidentiality obligation. It is also to note that only documents submitted in arbitration are confidential, whereas any document prepared for arbitration or related to arbitration is not within the scope of the confidential obligations.

In the Korea-Australia FTA, a party may designate any specific information confidential that it considers strictly necessary to protect privacy or legitimate commercial interest of particular enterprises, public or private, or to address essential confidentiality concerns.[33] Therefore, the scope of confidentiality has been extended to private and legitimate commercial interest in the Korea-Australia FTA.

Conduct of arbitration proceedings

The Australia-China FTA, Korea-Australia FTA and Australia-Japan FTA provide for the duties and performance-related code for arbitrators.[34] The first duty is to conduct arbitration proceedings "with fairness and diligence."[35] No arbitrator is allowed "to deny other arbitrator from taking part in any aspect of the proceeding."[36] This may also include the deliberation process. It should be the responsibility of the Chairman to make sure that all arbitrators are included in the process from the beginning till the end. There is no such provision in the Australia-Japan FTA; however, it may be assumed that all arbitrators will take part in the decision-making process. The Australia-Japan FTA assumes that each arbitrator understands that "prompt settlement of disputes is essential to the effective functioning of the Australia-Japan FTA".[37]

Arbitrators are not allowed "to delegate their duties of making decision on any other person."[38] In the Australia-Japan FTA, the same obligation is included; however, the arbitral tribunal may permit arbitrators' assistants, administration personnel, interpreters and translators to be present during its deliberations.[39] This is because the Code of Conduct allows delegation of "duty to decide" to any person "except as provided in the Rules of Procedures."[40] However, the Rule of Procedures only allows covered persons to be present during deliberation; it may not be assumed that the covered person will make the final decision.

This obligation of non-delegation is quite significant in terms of the rumours that arbitrators ask their assistants to draft the award. The controversial Yukos award has been challenged by Russia, on the basis that the assistant to the tribunal spent more hours and was paid for those hours, which was more than the time spent by the arbitrators, suggesting that perhaps the assistant was asked to draft the award, which was the duty of the arbitral panel.[41]

33 Korea-Australia FTA, Model Rules Para 21.
34 Australia-China FTA, Code of Conduct, Paras 5–11; Korea-Australia FTA, Code of Conduct, Paras 4–10; Australia-Japan, Code of Conduct, Para V (1–5).
35 Australia-China FTA, Code of Conduct, Para 6; Korea-Australia FTA, Code of Conduct, Para 5; Australia-Japan, Code of Conduct, Para V (2).
36 Australia-China FTA, Code of Conduct, Para 7; Korea-Australia FTA, Code of Conduct, Para 6.
37 Australia-Japan FTA, Code of Conduct, Para V (1).
38 Australia-China FTA, Code of Conduct, Para 8; Korea-Australia FTA, Code of Conduct, Para 7.
39 Australia-Japan FTA, Rules of Procedure, Para 18.
40 Australia-Japan FTA, Code of Conduct, Para V (4).
41 Dmytro Galagan, "The Challenge of the Yukos Award-An Award Written by Someone Else-A Violation of Tribunal's Mandate?", Kluwer Arbitration Blog, available at http://kluwerarbitration

In arbitration, if the tribunal requires or a party requests, an expert may be engaged to assist the tribunal to reach a conclusion. The expert can be an individual or a body. The parties will agree on the terms and conditions for engagement of the expert. Any technical information or views of the expert so obtained by the tribunal must be provided to the parties also for comments.[42] This is, of course, to maintain the due process within the arbitration proceeding.

Use of Indicative Time Table

The Australia-China FTA provides for a clear timeline for the operation of a dispute resolution process. In order to strengthen the importance of time limit and timely execution of various activities, an "Indicative Time Table for the Arbitral Tribunal" is also added as an Annex 15-B attached with the "Model Rules of Procedure for the Arbitral Tribunal."[43] An outer limit for the completion of a dispute resolution procedure is set at 270 days "from the date of establishment of the arbitral tribunal until the issuance of the final report."[44] This time limit is a general rule, and parties with agreement may change the number of days. If the general rule is adhered to, then it is possible to resolve disputes faster under the Australia-China FTA, as compared to any other forum.

A similar trend is also noticed in the Korea-Australia FTA, which includes an Indicative Time Table for Dispute Settlement Panel, attached to the Model Rules of Procedure for Dispute Settlement Panel Proceedings.[45] According to this time table, a final report is expected to be issued between 170 and 240 days from the date of establishment of the panel. However, the upper limit of deadline for the issuance of final report is 270 days, which is the same as that of the Australia-China FTA.[46]

The Indicative Time Table in the Australia-Japan FTA is even shorter than that of the Korea-Australia FTA. In the Australia-Japan FTA, a period of 23–26 weeks is given, which is approximately 161–182 days from the date of establishment of the tribunal to release the award to the parties.[47] At the same time, Proceedings of Arbitral Tribunal declares that the maximum days to issue the award to the parties must not be more than 6 months, which is approximately 180 days.[48] Therefore, in terms of number of days, arbitrators have less time under the Australia-Japan FTA as compared to the Australia-China FTA and Korea-Australia FTA. From the parties' point of view, the tribunal can decide a dispute faster in the Australia-Japan FTA. All these dates are, of course, a general guideline and with the agreement of the parties, it can be extended.[49]

A time period for the written submissions and documents is also set under the Australia-China FTA. For example, the complaining party is required to submit its first

blog.com/2015/02/27/the-challenge-of-the-yukos-award-an-award-written-by-someone-else-a-violation-of-the-tribunals-mandate/.

42 Australia-China FTA, Model Rules, Para 20; Korea-Australia FTA, Model Rules, Para 26.
43 See Annex 15-B of Australia-China FTA.
44 Australia-China FTA, Model Rules, Para 2.
45 See Annex 20-B of Korea-Australia FTA.
46 Korea-Australia FTA, Model Rules, Para 2 and Annex 20-B.
47 Australia-Japan FTA, Indicative Time Table, Attachment A.
48 Australia-Japan FTA, Para 19.9 (6).
49 Australia-China FTA, Model Rules, Para 2; Korea-Australia FTA, Model Rules, Para 2; Australia-Japan FTA, Article 19.9 (6).

written document within 14 days from the date of appointment of the final arbitrator, and the party complained against is then supposed to submit its reply within 30 days from the date of delivery of the first written submission by the complaining party.[50] The complaining party, in the Korea-Australia FTA, also has 14 days to make its written submission, but the respondent has only 21 days.[51] In the Australia-Japan FTA, both the complaining party and the party complained against have a shorter time, i.e., 10 days and 20 days, respectively.[52]

It may seem unreasonable to give less time to the complaining party as compared to the party complained against. However, this may not be the case, as the complaining party might have prepared and already submitted most of the information regarding the dispute at the time of filing the notice for consultation and for the request for the establishment of the panel to resolve the dispute. Therefore, a lesser time period given to the complaining party is justified.

The arbitral tribunal, in the Australia-China FTA, is obligated to commence hearing 30 days after the submission of the party complained against.[53] The initial report also needs to be issued 30 days after the receipt of the written supplementary submissions by the parties.[54] That means that the tribunal has to work at a fast pace to complete the writing of the report. Parties are also required to react faster, as they are given only 10 days to make written comments on the initial report.[55] Thereafter, the tribunal gets only 20 days to make the final report to the parties.[56]

The process is even faster in the Korea-Australia FTA, as the tribunal fixes the first hearing with parties within 20–45 days, and the initial report is issued 60–90 days thereafter. However, parties get more days (14 days) to give their comments on the initial report, as compared to the Australia-China FTA. The final report is made available to the parties in 31 days.[57] As a general rule, in the Korea-Australia FTA, the panel is bound to give "sufficient time to the parties to prepare their submissions."[58]

The arbitration process is very fast in the Australia-Japan FTA; therefore, all time limits are shorter, as compared to the Australia-China FTA and Korea-Australia FTA. However, in the Australia-Japan FTA, parties get two substantive hearings, whilst in the Australia-China FTA and Korea-Australia FTA, parties get only one hearing.[59] In the Australia-China FTA, however, parties are allowed to provide written supplementary submissions after the first hearing.[60] Though the time limit is very short in the Australia-Japan FTA, the time period to give comments on the draft award is longer, i.e., 15 days, as compared to the Australia-China FTA (10 days) and Korea-Australia FTA (14 days). The final award in the Australia-Japan FTA is issued to the parties in 15 days after the

50 Australia-China FTA, Model Rules, Para 4.
51 Korea-Australia, Model Rules-Indicative Time-Table, Para (a).
52 Australia-Japan FTA, Indicative Time-Table, Para (b).
53 Australia-China FTA, Model Rules-Indicative Time-Table, Para 2.
54 Australia-China FTA, Model Rules-Indicative Time-Table, Para 4.
55 Australia-China FTA, Model Rules-Indicative Time-Table, Para 5.
56 Australia-China FTA, Model Rules-Indicative Time-Table, Para 6. The time limit is 30 days from the date of issuance of the initial report which includes 10 days for the comments to receive from the parties.
57 Korea-Australia FTA, Model Rules-Indicative Time-Table, Annex 20-B.
58 Korea-Australia FTA, Model Rules, Para 3.
59 Australia-Korea FTA, Indicative Time-Table, Annex A, Paras c & e.
60 Australia-China FTA, Model Rules, Indicative Time-Table, Para 3.

submission on their comments, which is faster than the Australia-China FTA (20 days) and Korea-Australia FTA (31 days).

Presence of arbitrators in hearings and deliberations

All arbitrators in the hearings and deliberations under the Australia-China FTA are required to be present, even though assistants, translators and designated note-takers may be present during the hearings who are not allowed to take part in the deliberations.[61] In the Korea-Australia FTA, assistants, interpreters or translators or designated note-takers may be present in the hearings, and with the permission of the parties, they may also be present in deliberations.[62] In the Australia-Japan FTA, the tribunal may permit the presence of arbitrators' assistants, administration personnel, interpreters and translators during deliberations.[63] For this purpose, the tribunal in the Australia-Japan FTA may not be required to consult parties. Therefore, whilst the Australia-China FTA allows assistants, note-takers, interpreters and translators only during hearings but not in deliberations, the Korea-Australia FTA allows them to be present in deliberations (and assumed to be present during hearings, too). However, according to the Australia-Japan FTA, the tribunal on its own may allow those people to be present during deliberations and assume that they are allowed to be present during hearings; this is also similar to the situation in the Korea-Australia FTA.

All the meetings of the tribunal must be presided over by the Chair of the Tribunal. Other arbitrators may delegate authority to the Chair to deal with administrative and procedural decisions.[64] Such delegation of the authority is good for the efficiency of the arbitral tribunal to resolve disputes in a speedy matter. There are several administrative and procedural decisions that are important that can be taken by the Chair alone, without involving other arbitrators.

In the Australia-China FTA, arbitral hearings are not mandatory. They can only be organised if parties agree to an oral hearing.[65] In case the oral hearing is arranged, the tribunal must ensure an equal amount of time for each party.[66] The Chair of the Tribunal fixes the time limit with a view to providing equal time to parties.[67] It is to note that due process is satisfied by giving an equal amount of time, and there is no obligation to provide a "reasonable," "full" or "adequate" opportunity to present the case. At the hearing, first the complaining party is given the opportunity to make its argument, followed by arguments of the party complained against. After the main arguments, the complaining party is given time to make a reply, followed by a counter-reply by the party complained against.[68]

61 Australia-China FTA, Model Rules, Para 9.
62 Korea-Australia FTA, Model Rules, Para 7.
63 Australia-Japan FTA, Rules of Procedure, Para 18.
64 Australia-China FTA, Model Rules, Para 10; Korea-Australia FTA, Model Rules, Para 5; Australia-Japan FTA, Rules of Procedure, Para 16.
65 Australia-China FTA, Model Rules, Para 12.
66 Australia-China FTA, Model Rules, Para 14.
67 Australia-China FTA, Model Rules, Para 14.
68 Australia-China FTA, Model Rules, Para 14.

Language in arbitration

Chinese is the language of China, and English is the language of Australia, but the Australia-China FTA includes English as the working language of the arbitral proceeding. This is not a strange provision, considering China has agreed to use English as the working language in other FTAs that it has signed.

The Australia-Japan FTA provides use of dual language in arbitration. It provides that the proceedings of the arbitral tribunal are to be conducted in both English and Japanese. The same condition is also applicable on oral and written submissions.[69] It is the obligation on a party to provide translation of the written submission in the language of the other party and consequently bear the cost of translation.[70] In other words, if Australia submits a document in English, then it has to get that document translated into Japanese and also bear the cost of the translation. However, the cost of interpretation is borne by the parties in equal share. For the purpose of interpretation, the Australia-Japan FTA provides a general rule that the party in whose capital a meeting is held will be responsible for organising interpretation services for the meeting.[71] One may argue that the use of dual languages may delay the process; at the same time, it may also be argued that a proceeding in a native language of the parties may result in a well-informed decision. China and Korea also have language differences with Australia, but those two countries have not agreed to the dual languages proceeding with Australia.

Venue of hearing

It is believed that parties in a dispute may enjoy the local advantage if the venue of the hearing is set in their country. This presumption is dispelled in the Australia-China FTA. The parties' agreement is respected in the Australia-China FTA, so the first method of deciding the venue of the hearing is through parties' agreement. If, for some reasons, parties cannot agree on the venue of the arbitration hearing, then as default rule, the first hearing will be conducted in the territory of the parties complained against. The second hearing and any further hearings thereafter will be conducted alternatively in the territories of the parties. In other words, the second hearing will be conducted in the territory of the complaining party, and the third hearing will be organised in the territory of the party complained against.[72] A similar approach has been adopted in the Korea-Australia FTA, too.[73] However, the decision on the venue of the meeting has been left to the Chair in the Australia-Japan FTA to decide in consultation with the parties and other arbitrators.[74] There is no default rule on venue in the Australia-Japan FTA, similar to the Australia-China FTA and Australia-Japan FTA.

Considering the size of China and Australia, parties still have to agree on the venue, for example, whether the venue of the hearing should be in the capital or any other place. The Model Rules in the Australia-China FTA do not shed any light on that. Therefore, for all practical purposes, both Australia and China have to agree on a venue. The only innovation

69 Australia-Japan FTA, Rules of Procedure, Para 37.
70 Australia-Japan FTA, Rules of Procedure, Para 38.
71 Australia-Japan FTA, Rules of Procedure, Para 39.
72 Australia-China FTA, Model Rules, Para 22.
73 Korea-Australia FTA, Model Rules, Para 29.
74 Australia-Japan FTA, Rules of Procedure, Para 4.

one can note in this provision is that the venue is not limited to the capital city; rather, it could be organised anywhere within the territory of a party. Depending upon the nature of the dispute, sometimes it would be helpful to organise the hearing at a place that has more evidence of the measures in dispute.

Implications of violations of the Code of Conduct

Violation of the Code of Conduct by an arbitrator is itself a determinable matter; therefore, no arbitrator is allowed to "communicate matters concerning actual or potential violations."[75] If the matter is necessary to ascertain whether an arbitrator has violated or may violate the Code of Conduct, then an arbitrator may communicate such matter, otherwise that arbitrator has to inform both parties. This is perhaps for the purpose of maintaining the integrity of the questionable arbitrator, unless the FTA Joint Committee of the Australia-China FTA or Korea-Australia FTA, as the case may be, finally resolves the matter. China, Korea and Japan have set the trend of making the violation of code of conduct itself a disputable ground.

Arbitrators in a commercial arbitration are familiar with such codes, but the same arbitrators may not be compelled to follow such codes when deciding State v State disputes under FTAs. Now, with the inclusion of the Code of Conduct in the Australia-China FTA, Korea-Australia FTA and Australia-Japan FTA, arbitrators will be bound by the code, and violation of this code may lead to removal of arbitrators.

Conclusion

China, South Korea and Japan have set a new and positive trend in the dispute settlement mechanism of their FTAs. The most important trend is to include the Code of Conduct for arbitrators in the dispute settlement system. This Code of Conduct is a package, which covers independence, impartiality and other necessary measures that are important for maintaining the integrity of the dispute-resolution mechanism. In the commercial arbitration world, such measures are common and have been in use for a long time; however in the FTA dispute-resolution system, such measures were not used until recently. In other words, arbitrators under the FTA dispute settlement system were not under strict scrutiny, as compared to any commercial arbitration. The whole Code of Conduct is binding on arbitrators, which is a very positive development, but the rule relating to self-disclosure is far more important. According to this rule, the obligation is on the arbitrator to disclose any situation of actual or apparent bias and not on the parties. From the parties' perspective, this is a big relief. In this regard, it is also important to note that the personal and private information of arbitrators should not be of public scrutiny. Therefore, Japan has made it clear that the obligations of self-disclosure on arbitrators should not be administratively cumbersome and go beyond its purpose, so that a qualified person may not be able to perform the main duty of resolving disputes. In essence, a fine balance should be maintained for this purpose. Separate Model Rules of Procedures for arbitration are another significant development in the FTAs of China, South Korea and Japan, which provide default rules for arbitration, unless parties agree otherwise. In

75 Australia-China FTA, Code of Conduct, Para 11; Korea-Australia FTA, Code of Conduct, Para 10. Australia-Japan FTA, Code of Conduct, Para V(5)

the FTA dispute settlement system, earlier emphasis was not put on rules of procedure, but rather, it was left open for the tribunal to design or adopt them in consultation with parties. The default rules are now available for the arbitral tribunal to follow, which has been negotiated between the parties. The presence of default rules in the FTAs of China, South Korea and Japan will help develop a consistent application of rules in any arbitration under the respective FTAs. Similarly, an Indicative Time Table sets the clock right from the beginning for the parties, as well as for the Tribunal, to resolve the disputes in a timely manner. From a logistics point of view, the Time Table is easy to refer to now, as compared to the past. In the earlier FTAs, one could only calculate the time period by reading various provisions in the FTAs. From the users' point of view, one may quickly compare as to which FTAs may help resolve the dispute in a timely manner. Arbitrators will also be mindful of the time limit before they accept appointment. Otherwise, in commercial arbitration or in investment arbitration, delay in issuing the award has become very common. Finally, use of cooperation as the means of dispute resolution has become the hallmark of Asian FTAs, particularly those of China and South Korea. From an Asian perspective, cooperation between disputants is always appreciated in resolving their disputes. However, it is not settled yet, the legal implication of this cooperation provision as to whether any violation of this obligation may give rise to any cause of action or not.

It has been argued that proliferation of FTAs may have an impact on the domestic courts in the administration of justice. Similar arguments have been raised about the impact of the World Trade Organisation (WTO) on domestic jurisdiction, which is a valid point. This is because, as a member of the WTO, all members are required to align their domestic rules with the WTO rules. For example, law on intellectual property rights, anti-dumping and so on are a few examples that forced every members of the WTO to amend their local laws in line with the WTO rules. China is one example, which has to amend more than a thousand legislations and rules to bring them in line with the WTO requirements. If there is any violation of WTO rules, then a member of the WTO may initiate dispute against the member who is alleged to violate WTO rules. The general impact of FTA on domestic legislation has not been evident. One may see the change in rules in favour of FTA partners. For example, change in rules of origin, lower threshold for establishing service companies and so forth may have been put in place in light of specific FTAs. To this extent, one may argue that FTAs have some impact on domestic legislations. At the same time, it should be noted that such favourable treatment to a FTA partner is allowed under the WTO, and it is not considered as the violation of Most Favoured Nation (MFN) principle. Disputes under FTAs are not common. In Asia, no bilateral FTA has been invoked yet for a formal dispute settlement. However, a rule-based dispute settlement system in a FTA gives predictability about how a dispute might be resolved as and when that may arise.

With these new trends in action, one may conclude that China, South Korea and Japan are developing a new Asian style of dispute resolution mechanism in their FTAs, whether signed with developed or developing countries.